

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jeffrey and Isabelita Miller

Chapter 7

Debtor(s).

BK 04-31514 GFK

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 3:00 p.m. on August 2, 2004, in Courtroom 228B, at the United States Bankruptcy Court, United States Courthouse, 316 North Robert Street, St. Paul, MN 55101.

Any response to this motion must be filed and delivered not later than July 28, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than July 22, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jeffrey and Isabelita Miller

Chapter 7

Debtor(s).

BK 04-31514 GFK

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 3:00 p.m. on August 2, 2004, in Courtroom 228B, at the United States Bankruptcy Court, United States Courthouse, 316 North Robert Street, St. Paul, MN 55101.

3. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on March 15, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant

requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors list three claims totaling \$ 23,800.00 secured by household goods and a 1999 Plymouth Grand Voyager, and a 2000 Chevrolet Malibu.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed fourteen claims totaling \$ 25,207.00.

8. The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list a monthly net income of \$ 2,831.00. The debtors are married and list no dependents. On May 3, 2004, the United States Trustee wrote to the debtors for additional financial information. *See* Att. Ex. 1. The debtors timely responded on June 7, 2004. *See* Att. Ex. 2 (without attachments).

Based on the pay stub of Jeffrey Miller ^{1/}, for pay period ending March 26, 2004, he has the

^{1/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the

following net income:

YTD Gross	\$ 11,184.11
Less YTD	
All Taxes	(2181.09)
Dental	(29.89)
Medical	(233.03)
Vision	(8.19)
YTD Net Income	\$ 8,731.91

\$ 8,731.91 divided by 7th pay period = \$ 1,247.41 average pay per period x 26 pay periods divided by 12 months = \$2,702.73.

Based on the pay stub of Isabelita Miller, for pay period ending March 26, 2004, she has the following net income:

YTD Gross	\$ 9,824.86	
Less YTD		
All Taxes	(1879)	[the pay stub cuts off the last digit, so the last digit is estimated to provide the largest deduction]
Dental	(29.89)	
Medical	(225.75)	
Vision	(8.19)	
Legal	(56.77)	
YTD Net Income	\$ 7,625.26	

\$ 7,625.26 divided by 7th pay period = \$ 1,089.32 x 26 pay periods divided by 12 months = \$ 2,360.20 average net pay per month.

debtor (if a copy was not retained) or the chapter 7 trustee. The U.S. Trustee may submit the pay stubs at any hearing.

\$ 2,702.73 + \$ 2,360.20 = \$ 5,062.93 average net pay per month.^{2/}

The average year to date pay stubs, which occur early in the year, may skew overtime or bonuses. Therefore, an alternative calculation is based on 2003 income:

2003 Gross Income	30,738.98 + 37,721.04 =	\$ 68,460.02
Less Social Security	1905.82 + 2338.70 =	(4,244.52)
Less Medicare	445.72 + 546.96 =	(992.68)
Adjusted Gross		\$ 63,222.82
Less 2003 Fed Taxes		(5,191)
Less 2003 State Taxes		(2290)

^{2/} Majority of courts find that voluntary repayment of retirement account loans is considered part of disposable income. *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775, 777-78 (6th Cir. 1995); *In re Cohen*, 246 B.R. 658, 666-67 (Bankr. D. Colo. 2000) (citing *In re Anes*, 195 F.3d 177, 180 (3rd Cir. 1999); *In re Jaiyesimi*, 236 B.R. 145, 148 (Bankr. S.D.N.Y. 1999); *In re Delnero*, 191 B.R. 539, 543 (Bankr. N.D.N.Y. 1996); *In re Fulton*, 211 B.R. 247 (Bankr. S.D. Ohio 1997)).

Majority of courts also find that voluntary contributions to retirement accounts is considered part of disposable income. See e.g. *Behlke v. U.S. Trustee*, ____ F.3d ____ (6th Cir. 2004); *In re Anes*, 195 F.3d 177 (3rd Cir.1999) (adopting per se rule that voluntary contributions to retirement plan constitute disposable income under Section 1325) *In re Taylor*, 243 F.3d 124 (2^d Cir.2001) (adopting a case by case test to look at the age of the debtor, the mandatory nature of the contributions and impact on employment, dollar amount of any penalties, and other circumstances); *In re Delnero*, 191 B.R. 539, 542 (Bankr. N.D.N.Y. 1996); *In re Cornelius*, 195 B.R. 831 (Bankr. N.D.N.Y. 1995); *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994); *In re Scott*, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (not reasonably necessary under §1325(b)); *In re Fountain*, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (cannot make voluntary contribution unless pay Ch. 13 creditors in full); *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991); *In re Colon Vazquez*, 111 B.R. 19, 20 (Bankr. D. Puerto Rico 1990); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985); *In re Harshburger*, 66 F.3d 775, 777 (6th Cir. 1995) (Ch 13 case: not necessary for maintenance or support); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237-38 (Bankr. D. Md. 1996).

After Tax Net 2003

\$ 55,741.82

\$ 55,741.82 divided by 26 pay periods = \$ 2,143.92 average net per pay period - Dental (2 x 4.27) - Medical Ins. (33.29 + 32.25) - vision (2 x 1.17) - legal ins (8.11) = \$ 2,059.39^{3/}

\$ 2,059.39 x 26 pay periods divided by 12 = \$ 4,462.01 average net pay in 2003.

10. On Schedule J, the debtors lists monthly expenses of \$ 3,165.00.

11. Average net monthly income of \$ 4,462.01 less monthly expenses of \$ 3,165 provides the debtors with monthly disposable income of \$ 1,297.01.

12. Since the U.S. Trustee has taken out 401K loan repayments from the disposable income calculation, some tax penalty will result, which the U.S. Trustee estimates to be \$ 6,800 (Loans on Schedules total \$ 34,000 x .20 estimated penalty rate = \$ 6,800).

13. Monthly disposable income of \$ 1,297.01 would enable the debtors to pay approximately 100 % of the unsecured creditors and estimated tax in a hypothetical thirty six month Chapter 13 plan.

14. In the alternative, the U.S. Trustee notes that the debtors can continue to pay the 401K loan balance and fund a hypothetical Chapter 13 Plan. Current 401K loan payments total \$ 893.88 per month. \$ 1,297.01 - \$ 893.88 = \$ 403.13 in disposable income, which would pay \$ 14,512.68 or 58 % of general unsecured creditors in a hypothetical Chapter 13 plan.

15. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

^{3/} 2003 figures are taken from 2003 tax return and W-2 figures. Pay period reductions are taken from pay stubs.

16. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: June 17, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500



U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

U.S. Courthouse, Suite 1015

612 / 664-5500

300 South Fourth Street

FAX 612 / 664-5516

Minneapolis, MN 55415

May 3, 2004

Robert J. Everhart
P O Box 120534
New Brighton, MN 55112

Re: *Jeffrey R. and Isabelita F. Miller*, Bankr. No. 04-31514

Dear Mr. Everhart:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide **copies** of the following information on or before May 28, 2004.

1. Copies of last three pay stubs for both debtors.
2. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).

Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

Sarah J. Wencil
Trial Attorney

cc: Jeffrey R. and Isabelita F. Miller
Nauni Jo Manty, Chapter 7 Trustee

EVERHART LAW OFFICE, LTD
Robert J. Everhart

RECEIVED

P.O. Box 120534
New Brighton, Minnesota 55112
Telephone: 651-636-9212
Fax: 651-636-8879

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OFFICE OF THE
UNITED STATES TRUSTEE

June 04, 2004

Office of the US Trustee
Attn: Sarah J. Wencil
US Courthouse Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

RE: Jeffrey R. & Isabelita F. Miller
BKY Case No: 04-31514


Dear Ms. Wencil:

Enclosed please find the following information requested:

1. Copies of last three pay stubs for both debtors.
2. Copies of the 2002 and 2003 state and federal tax returns.
3. Documentation of mandatory retirement. As stated on pay stubs, approximately \$40.00 is mandatory for Jeffrey and Isabelita.

If you have any questions or would like to discuss this further please do not hesitate to call our office.

Sincerely,


Robert J. Everhart
Attorney at Law

Encl:

Cc: Jeffrey R. & Isabelita F. Miller

Attached Exhibit "2"

VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: June 17, 2004

Signed:

/s/ Sarah J. Wencil

Sarah J. Wencil

Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jeffrey and Isabelita Miller

Chapter 7

Debtor(s).

BK 04-31514 GFK

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988);

United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with

future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)

See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)

(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay 100% of the general unsecured creditors

in a hypothetical thirty six month Chapter 13 plan, if the debtors discontinue 401K loan repayments. In the alternative, the debtors can pay 58% of general unsecured creditors, if they continue their 401K loan payments. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: June 17, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jeffrey and Isabelita Miller

Chapter 7

Debtor(s).

BK 04-31514

CERTIFICATE OF MAILING

I, Terri Frazer, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

That on June 17, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.


Addressee(s):

Jeffrey and Isabelita Miller
1031 Case Street East
St. Paul, MN 55106

Nauni Jo Manty
Rider Bennett LLP
333 South Seventh Street, Suite 2000
Minneapolis, MN 55402

Robert J. Everhart
PO Box 120534
New Brighton, MN 55112

Linda Jungers
Stewart, Zlimen, & Jungers Ltd
430 Oak Grove Street #200
Minneapolis, MN 55403



**Office of the United States Trustee
Terri Frazer**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jeffrey and Isabelita Miller

Chapter 7

Debtor(s).

BK 04-31514 GFK

ORDER

At St. Paul, Minnesota, this _____ day of _____, 2004, the United States
Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of
the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant
to 11 U.S.C. Section 707(b).

The Honorable Gregory F.Kishel
United States Bankruptcy Judge